VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

Virginia Justice.

It is exceedingly gratifying to Virginians to be able to read an article like the one which we copy below from the New York *Churchman* of September 28th, 1912, nor do we believe the high compliment paid this State is unmerited. The article is as follows:

"The successful prosecution of the members of the Allen clan who were responsible for the Hillsville murders is a fresh example of the rigid enforcement of the law in Virginia and suggests the question why juries in Virginia convict murderers with greater regularity than they do in other states. Statistics show that the United States is behind all other civilized countries in proportion of its murderers convicted by the court. As a result it leads all other civilized countries in proportion of crimes of violence to population. The Virginia record is an exception to the American rule. In a number of notable murder trials in Virginia convictions have followed with remarkable regularity, and the members of the Allen clan have had the same experience with Virginia courts that other kinds of criminals, equal to them in their degree of guilt, have met with. Since the judicial system of the various states is much the same, Virginia's success in bringing murderers to justice cannot be attributed to differences in the law or in the legal machinery provided for enforcing it. In states having a mountain population like Virginia, mountain outlaws not infrequently commit crimes of the character charged to the Allen clan, but justice is rarely meted out to them so effectively. English criminal courts are usually singled out as examples of the best method by which the guilty may be brought to justice. The surprising thing is that Virginia, which has a legal system practically identical with that of other commonwealths, with possibilities of the same loopholes of escape, succeeds in convicting its criminals with exceptional regularity. The cause of this unique position deserves closer investigation, and the achievement of Virginia justice deserves something more than eulogy.

> Other states might undertake to learn from her example how to deal successfully with these types of lawlessness which discredit American civilization."

The *Churchman,* however, is mistaken in the idea that the judicial system in Virginia is much the same with that of other states. There are many decided differences—some of which may help to account for the speediness of justice in this State. One is our system of courts meeting frequently; another is the law permitting a special grand jury to be impannelled at any term of court; another is the lack of any intermediate court of appeals. And we believe one great aid in the celerity of our criminal proceedings and the prompt punishment of offenders is that our Supreme Court of Appeals has set its face sternly and unequivocally against granting writs of error upon any but the most substantial grounds and carefully examines the record not so much to find reasons for granting the writ, as for good reasons why it should not be granted—in other words, getting at the exact justice of the whole case from the whole record and not allowing a harmless error to enable a convicted criminal to clog the wheels of justice with trifles. The result of this has been to discourage frivolous appeals and to put lawyers upon their guard. We believe this course on the part of our Supreme Court has done as much to accelerate justice as has the frequency of our courts and the readiness with which grand juries can be impannelled.

Nor can we forbear from the natural pride we feel in the fact that the people of Virginia coming mostly from English and Scotch and Irish ancestors have the sense of law and order and justice implanted in them both from ancestry and environment. Liberty has not yet become license among us nor crime ceased to be viewed with horror and abhorrence.

Capital Stock of a Corporation.

There has been some criticism of the decision of our Supreme Court of Appeals in the case of Monk *v.* Barnett, reported in the October Number of the REGISTER, p. 431. Had this criticism been directed at the legislation on the subject we believe it would be proper, but the decision in the case named is, in our judgment, absolutely correct under the law as it exists in the State of Virginia.

The Virginia corporation law has been repeatedly stated as founded on that of New Jersey, but we think a careful examination of these two statues will show that, while there is a similarity, there is also a marked difference. The New Jersey statute limits the issue of capital stock to the amount of the value of the property or other thing than money for which it is issued. The Virginia statute does not so limit the issue, but expressly allows the issue to be made for money or property *less than its* face value, provided only the statement of the basis on which the issue is made is filed with and accepted by the Corporation Commission. The New Jersey statute allows nothing but money to be considered as payment of any part of the capital stock, except as provided in the case of the purchase of property. By this exception a corporation may purchase property necessary for its business and "issue stock to the amount of *the value thereof* in payment therefor." The judgment of the Directors is said to be conclusive as to the value of the property purchased, but the New Jersey courts have practically nullified this last provision. Vice Chancellor Pitney in Receiver *v.* Heppenheimer, 69 N. J. Eq. 36, seems to well-nigh ignore the statute when he says that

> "The capital stock of all corporations should at the start represent the same *value* whether paid for in property or money." "That result," he said, "can only be obtained by supposing that the property is to be appraised at its actual cash value, precisely as if a board of directors with the whole capital stock actually paid in cash is dealing at actual 'arms-length' as real purchasers with the owner of property proposed to be purchased as a real vendor without any interest in the directors to overvalue the property, or other interests inconsistent with the real interest of the stockholders as such * * *
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> "After all, it seems to me that the true test, under this statute, as applied to the case here in hand, is this: if the company actually had to its credit in the bank the sum of $5,000,000, would it have been willing to have paid that price in cash for the property in question for the uses and purposes to which it proposed to devote it; would the property be worth that sum in cash to the company?"

The New Jersey statute evidently contemplates that the directors must state what they consider the real value and the

issue is limited to that. The Virginia statute seems to contemplate two values—i. e., that at which the property or services are to be received, and the real value; both must be stated, if different. The Virginia statute also makes the judgment of the directors conclusive in the absence of fraud, following the statutes of several other states in declaring that the value agreed upon between the directors and subscriber shall be final and conclusive. The foundation of these last named statutes is evidently the English Companies Act of 1867, and whilst this Act has been materially changed by the Act of 1908 there seems to have been no change in the doctrine as laid down in Ooregum Gold Mining Co. *v.* Roper, A. C. 125, and Re Innes & Co. Ltd. (1903), 2 Ch. 252 C. A., which is that the courts will not rip up a transaction which is not proved to be dishonest merely because the company may have paid an extravagant price for the property taken as a subscription. Laws of England, vol. 5, p. 89.

The Virginia Act seems to contemplate that the filing of the valuation and approval by the Corporation Commission is a sufficient safeguard; the English Act requires full and detailed statements of the facts to be embodied in prospectuses where an appeal is made to the public for subscriptions and such statements to be filed in the office of the Registrar of Corporations, and the most complete disclosures made with the greatest possible publicity.

An examination of our statute and a comparison with the New Jersey and English Act must convince any one that the decision of our Supreme Court in Monk *v.* Barnett is absolutely correct. But that our Act sufficiently safeguards the public is another question. We do not believe it does. Not only should the fullest and frankest disclosure of all the facts concerning the property serving as a basis for stock issue to be made, but the approval of the Commission should be required to be something more than a perfunctory matter. Every prospectus calling for subscriptions should be required to state the *actual* value of the property as well as the value at which it is stocked in, and the fullest publicity should be required.

And in addition to this we believe that there could be no better way of safeguarding the public from over-capitalization and wild

cat schemes than requiring every certificate of stock issued by a corporation to show whether the same was paid for in money or if otherwise paid the actual value of the property taken in payment of subscription and the amount which the Directors agreed to pay for the same.

Orders of Publication in Divorce Proceedings Again.

Apropos of our editorial in the October number of THE REGISTER (ante, p. 467), commenting on the Act approved March 7th, 1912, Session Acts 1912, p. 170, we have been informed that Judge Hundley of the Fifth Judicial Circuit has held this Act to be unconstitutional, basing his decision on § 52 of the Virginia Constitution, 1 and 2, which provides that "No law shall embrace more than one object which shall be expressed in its title; nor shall any law be revised or amended with reference to its title, but the Act revised or the section amended shall be re-enacted and published at length."

We have not been furnished with a copy of Judge Hundley's opinion, if any was rendered in writing, but we are by no manner of means satisfied that the learned Judge's conclusions are correct.

Certainly the law is not open to the criticism that more than one object is embraced in it and that this object is not expressed in its title. The object is to provide for notice to defendants in divorce proceedings not found within the jurisdiction of the State, and the entire act has but one object as set out. The other objection that it amends § 3230 of the Code without alluding to it in any way, is more serious and yet, as we attempted to show in our editorial, the effect of the act under discussion is not to amend that act or revise it, but to repeal it altogether.

At the same time we sincerely hope Judge Hundley is right. Any way consistent with law which will enable us to escape the consequence of such a bungling piece of legislation is to be hailed with delight. We are of opinion, however, that lawyers bringing suits for divorce against non-residents or persons not found in the jurisdiction of the State should exercise the greatest care

in their proceedings. We believe that affidavit should be made both under the old law and the new. This may be surplusage, but that cannot do any harm. Then the order of publication should be obtained from the court in term, and a copy mailed as required by the previous statute. If this is done, then we believe that the danger of mistake is minimized and no matter what the decision of the Supreme Court may be upon the new Act, the law has been sufficiently complied with.

At the same time we sincerely hope that an early decision on this important question may be had and the present uncertainty ended.

Liabilities of Municipalities for Polluted Water Supply.

The question of the taxation of water and gas plants owned by our cities is quite a live one in this State just now, owing to the determination of the Auditor to test the question. Ottawa—in our neighbor across the Great Lakes—is faced with a more serious problem just now. Damage suits to the extent of nearly half a million dollars have been instituted by persons who have lost relatives or been made ill by water furnished by the city and which it is charged was carelessly allowed to become contaminated with the germs of typhoid fever. We have heretofore expressed our opinion that a municipality which goes into any business occupies exactly the same position that any individual would, and we can see no reason why these suits will not lie. The main question is one of evidence, for we suppose it would be exceedingly difficult to establish negligence in such a case. But given the necessary evidence and the liability it seems to us is exceedingly probable.

And yet in North Carolina the Supreme Court has held in Metz *v.* Asheville, 150 N. C. 748, 22 L. R. A., N. S., 940, that a city is not liable for the death of a person from typhoid fever caused by emptying a free public sewerage system into a stream running near his dwelling, and in Hughes *v.* Auburn, 161 N. Y. 161, Metz *v.* Asheville is approved in a very strong opinion. In New Hampshire and Vermont the courts held a recovery may be had in such a case where the municipality's

negligence is proven. In Pennsylvania—Wharten *v.* Bradford City, 209 Pa. 319—the court held the connection between the act of pollution of water and the result was too remote. A distinction, however, seems to be drawn between cases where injury to health as an element of damages is accompanied by injury to property. On this question, see an interesting note to Georgetown *v.* Com., 61 L. R. A. 713.

Contempt of Court.

We hardly know whether to be amused or grieved at the action of the intermediate Court of Appeals of the state of Georgia in a matter recently before it but of which we have so far only a newspaper account. We sincerely hope that the newspaper account is not justified by the actual facts.

It seems that this intermediate Court of Appeals reversed the decision of one of the nisi prius judges and that judge expressed somewhat vigorously his opinion of that court's opinion in thus reversing his decision. Thereupon the Georgia court haled the inferior judge before its august body for contempt of court and fined him five hundred dollars for *his* opinion of *their* opinion, and what his opinion now is, we can only conjecture. We doubt if it could be expressed in the pages of this journal except by dots and dashes. The language of the inferior judge it must be said was not judicial. He expressed his belief that the superior court in reversing his decision showed lack of grey matter in the brain, or to put it in plain everyday speech, want of judicial acumen. He did not allege corruption or misfeasance or in any way reflect on the integrity of the court—simply intimated that their decision was of the asinine variety, or words to that effect, and we must say that if the facts are properly reported the action of the appellate court on hearing this opinion goes a long way to prove that the angry inferior judge was not entirely wrong in his opinion. But be it distinctly understood—for we may some day be in Georgia and within the jurisdiction of the court—that we do not allude to any action of this court as a court but only to the brains of the individual members thereof in their civic capacity, thus we trust avoiding having a rule against us to be dealt with as they dealt with

the unfortunate inferior judge. For we cannot imagine a court—a high court—a court of appellate jurisdiction—condescending to take notice of a speech of this sort and actually to summon to its bar an inferior judge whose decision it had overruled for any language which merely reflected upon their legal or mental ability.

In the first place it exhibits a lack of dignity and a degree of sensitiveness carried to the extreme. Next we do not believe that the language used is constructive contempt. The newspaper account is somewhat hazy, but taking the language used by the inferior judge we could not construe it as either tending to belittle, to degrade or to obstruct, interrupt, prevent or embarrass the administration of justice. To be accused of lack of brains is, it is true, somewhat irritating, but hardly liable to seriously belittle or degrade the administration of justice. To "cuss" the court is one of the inestimable privileges always allowed the losing lawyer and guaranteed by the higher law and ought to be extended to all overruled judges. At the same time we would advise all Georgia judges of the inferior variety and all practitioners in Georgia courts to "cuss" only when they got "outside the big gate." You remember the story: The overseer of an irascible Virginia planter, well known in the early history of the Commonwealth, asked the former overseer of the same gentleman how he had managed to stand the cursing and abuse of his employer. The former overseer replied, "I did not stand it—I cussed him back." A short time thereafter the second overseer with a couple of black eyes and carrying his arm in a sling met the former overseer and remonstrated with him for advising him to "cuss" Col. C. back. "Why, you darned fool!" the first overseer said, "Did you cuss him to his face?" "Why certainly. Didn't you tell me you always did it?" "No sir-ee," was the reply, "I always waited till I got out o' hearing and outside o' the big gate"